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Supreme Court, U.S.
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In The

Supreme Court of the United States

ALLEN BLACKTHORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When a defendant in a criminal case has objected on confrontation grounds to the admission of "former testimony" in violation of Federal Rule of Evidence 804(b), and the appellate court has determined that the improper admission of the "former testimony" is harmless under Federal Rule of Appellate Procedure 52(a), must a further inquiry be made as to whether a confrontation clause violation has occurred, and if so, must relief be granted unless the Government proves beyond a reasonable doubt that the error was harmless, as mandated by *Chapman v. California*, 386 U.S. 18, 24 (1967)?

Whether Federal Rule of Evidence 404(b) authorizes the admission into evidence of mere accusations that a defendant in a criminal case has previously sexually abused his daughter, when the Government does not even attempt to prove the truth of the same, supposedly for the purpose of establishing specific intent to kill, injure, hurt or maim the deceased where: (1) there is direct evidence of intent, and (2) the defendant does not put his intent into issue, or stipulates that his intent is not at issue?

Whether the intentional or knowing elicitation of perjured testimony from a key Government witness by a prosecutor who knows that defense counsel would be aware that the testimony was false should result in a reversal of the conviction unless the Government bears the burden of proving beyond a reasonable doubt that the testimony did not contribute to the verdict?

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OPINIONS BELOW

The opinion below is *United States v. Blackthorne*, No. 00-51256 (5th Cir. May 3, 2002) (unpublished). *See* **Appendix A**. A timely filed motion for panel rehearing and a suggestion for rehearing *en banc* were both denied on June 10, 2002. *See* **Appendix B**.

JURISDICTION

The Fifth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has certiorari jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process

for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 104(b), Federal Rules of Evidence

(b) **Relevancy conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Rule 404(b), Federal Rules of Evidence

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 804(b)(1), Federal Rules of Evidence

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a

different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT OF THE CASE

A. Summary of the Proceedings: On November 7, 1997, Sheila Bellush, was murdered in her home in Sarasota, Florida. Bellush, a former resident of Boerne, Texas, and the ex-wife of Petitioner, was allegedly murdered by Jose Del Toro, who traveled from San Antonio, Texas to Sarasota, Florida. Del Toro had been recruited by Samuel Gonzalez, who in turn had been recruited by Daniel Rocha, an admitted bookie, hustler, money launderer, tax evader, liar and suborner of perjury. Of the three, only Rocha knew or had any contact with Petitioner.

Florida and Texas quickly indicted Rocha, Gonzalez and Del Toro for the murder of Bellush, although Del Toro had fled to Mexico. Gonzales cut a deal with Florida and Texas in December 1997. Pursuant to that deal, he was sentenced to nineteen years in Florida and at the time of Petitioner's trial, was facing a thirty year cap on his Texas charge. Rocha was put to trial in Florida in January 1999 and was convicted and assessed a life sentence. His Texas indictment was pending at the time of Petitioner's trial. Del Toro was ultimately extradited from Mexico to Florida, and his Florida trial and Texas charge were also pending at the time of Petitioner's trial. Rocha and Gonzalez, but

not Del Toro, testified in the instant federal prosecution against Petitioner.[1] Del Toro pleaded guilty in Florida state court while the jury in the present case was deliberating. After extensive media coverage of Del Toro's plea, Petitioner was found guilty.

Florida did not indict Petitioner, in large part because Rocha had no credibility as a witness. Rocha admitted at Petitioner's trial that he knew that the Florida prosecutors had declared his value as a witness to be "zero." It was not until January 4, 2000, that Petitioner was charged in any jurisdiction. On that date, the two count federal indictment in this case was returned alleging a conspiracy to use interstate commerce facilities in the commission of murder-for-hire (18 U.S.C. § 1958) (count 1), and causing another to travel in interstate commerce to commit a crime of violence (18 U.S.C. § 2261(a)) (count two). That same day, Texas also indicted Petitioner for murder, and Petitioner was arrested on the federal charge without incident.

After jury selection, both sides presented evidence over the course of eleven days. The Government called 41 witnesses during its eight days of testimony. The defense called 19 witnesses, including Petitioner, during its three days of testimony. No rebuttal was presented. The jury convicted Petitioner on both counts after deliberating approximately 33 hours over the course of five days.

Extensive post-trial motions were filed, including a motion for new trial on the basis of newly discovered

[1] Rocha testified that Petitioner sought his assistance in finding someone to hurt or kill Sheila Bellush.

evidence under Federal Rule of Criminal Procedure 33. Key Government witness, Daniel Rocha, executed a post-trial affidavit recanting his trial testimony, confirming that Petitioner had nothing to do with Bellush's murder.[2] Rocha's affidavit also stated that he had told the Government of Petitioner's innocence, but that he was pressured by the Government to go forward. The district court declined to hold a hearing on any of the post-verdict motions and overruled them.

Petitioner was sentenced to life without parole on both counts on November 2, 2000. Notice of appeal was timely filed. Subsequently, the Fifth Circuit Court of Appeals issued an opinion affirming Petitioner's conviction and sentence. *United States v. Blackthorne*, No. 00-51256 (5th Cir. May 3, 2002) (unpublished) (**Appendix A**). A timely filed motion for panel rehearing and a suggestion for rehearing *en banc* were both denied on June 10, 2002. *See* **Appendix B**.

B. Summary of the Relevant Facts: The essence of the Government's theory of the case is that Petitioner allegedly contacted Daniel Rocha to find someone to hurt or kill Sheila Bellush. Rocha contacted Sammy Gonzalez, who then arranged for the assistance of Jose Del Toro. Ultimately, Del Toro traveled to Florida and murdered

[2] Rocha had attempted to cut a deal during his state murder trial in Florida, but when polygraphed, failed every question regarding Petitioner's alleged involvement. When confronted with his deceptive answers, he admitted to the polygraph operator that he had, in fact, lied about Petitioner's involvement. Rocha subsequently told CBS News in a taped interview that he had told the polygraph operator during the examination what he thought the prosecutors had wanted him to say.

Bellush. The Government relied heavily on hearsay statements made by Bellush during her very acrimonious divorce from Petitioner almost a decade earlier. Petitioner challenged the admission of these statements with mixed success. The Fifth Circuit held that some of the statements were erroneously admitted, but asserted that the errors were harmless, and others to have been admitted without error.

The Government also relied upon the false testimony of Sammy Gonzalez regarding an alleged photograph to tie Petitioner to the scheme to hurt or kill Bellush. Again, the Fifth Circuit held that the Government knowingly elicited false testimony, but found that the error was not material.

1. Erroneously Admitted Allegations of Threats: The Fifth Circuit found that the district court erroneously admitted parts of a 1987 civil discovery deposition by Sheila Bellush under the authority of Federal Rule of Evidence 804(b)(1), over Petitioner's objection that his attorney in 1987 would not have had the same motive to develop Bellush's testimony as Petitioner had during the criminal trial in June 2000, and that introduction of the deposition constituted a violation of the Confrontation Clause of the Sixth Amendment. By admitting the civil discovery deposition into evidence, the jury heard that at various dates prior to October 1987, Sheila Bellush claimed that: (a) Petitioner threatened to have Bellush killed or he would kill her (18R26); (b) Petitioner threatened to kill Bellush (on another occasion) (18R26); (c) Petitioner threatened to make sure Bellush never walked again and that her face would be maimed (on another occasion) (18R26-27); and (d) Petitioner threatened to kill Bellush or have her taken care of if she ever left him or tried to hurt his business (on other occasions). 18R27.

These four alleged threats were part of the Government's Rule 404(b) evidence offered to demonstrate Petitioner's intent, which included alleged threats against the victim from three other sources, dated five to ten years before the offense. 15R110 (Stevie Bellush, daughter of Petitioner and the victim); 18R147-48 (Michael McGraw, business associate); 22R236; 22R238-39; 22R241 (Kerry Bladorn, sister of the victim).

2. Allegations of Sexual Abuse: The trial court allowed the Government to elicit (through the testimony of nine different witnesses) allegations made by Sheila Bellush that Petitioner had sexually abused one of their daughters, Stevie.[3] The Government did not even attempt to introduce evidence to prove that these sexual abuse allegations were true (because, as the Government well knew, they were false) and the district court actually prohibited Petitioner from proving them to be false, instructing the jury that it should not consider the truth of the allegations. The district court instructed the jury that these sexual abuse allegations could be considered for purposes of Petitioner's motive, **intent** and to show the relationship between Sheila Bellush and Petitioner.

3. Knowing Presentation of Perjury: The Fifth Circuit found that, during the Government's direct

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[3] Bellush accused Petitioner of sexually abusing Stevie on three separate occasions: in January 1988, March 1988, and October 1988. Petitioner had denied Bellush's false allegations of sexual abuse at the times she made them and, ultimately, all were dismissed or simply faded away as unfounded and false. After October 1988, Bellush never accused Petitioner of committing any new acts of sexual abuse. Rather, she raised those original allegations in subsequent civil litigation in May 1991 (which went to trial in January 1992), in June 1993, and in June/July 1997, even though these claims were barred by res judicata.

examination of Samuel Gonzalez, the prosecutor knowingly elicited false testimony from him that on Saturday afternoon, September 13, 1997, while Del Toro and he were allegedly in Boerne, Texas, attempting to locate and beat Sheila Bellush, he actually saw Bellush in her back yard. 21R87-88.[4]

The prosecutor was well aware that this testimony was perjured because he knew that Bellush had moved from San Antonio to Sarasota on September 6, 1997. Additionally, during discovery, the Government had supplied Bellush's airline schedule to the defense. That airline schedule reflected that Bellush had flown from Sarasota to San Antonio on Sunday, September 14, 1997, arriving after 10:30 p.m., to attend a civil protective hearing on Monday, September 15, 1997, and then departed San Antonio on September 15, 1997, with two other people.

On direct examination, Gonzalez testified that, when he agreed with Daniel Rocha to have Sheila Bellush beaten, Rocha gave him two photographs of Bellush and informed him of Bellush's address in Boerne, Texas. 21R59;[5] 21R85.[6] On cross-examination, Gonzalez

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[4] According to Gonzalez, Del Toro wanted to "do it" right then, but Gonzalez got cold feet, drove slowly down the street, turned around and came back, at which time they could not find Bellush again. 21R87-88.

[5] Gonzalez testified on direct: "[H]e went over to the truck, and he said, 'Sam, I got to give you something.' I didn't know what it was at that time. So he went over to his truck, and he gave me two photos of Sheila, and on top of that, he reached in his wallet and gave me an address where Sheila lives in Boerne . . . on a . . . white piece of paper." 21R59.

[6] Gonzalez testified on direct: "I told him [Joey Del Toro] . . . to meet me at my apartment. . . . He took his car, and I took my truck. We went over to my apartment. I believe at that time, I had to pick up the

(Continued on following page)

reiterated that he had seen Sheila Bellush on September 13, 1997, and recognized her from the photos of Bellush he had been given by Daniel Rocha. 21R273-278. However, when defense counsel showed Bellush's flight schedule to Gonzalez, he admitted that he had been told by one of the prosecutors prior to his testimony that Bellush was not actually in Boerne on September 13, 1997. 21R277-278.[7]

Gonzalez' perjured testimony was elicited in an attempt to corroborate the testimony of Rocha (as well as Gonzalez' own testimony) regarding having received and seen photos of Sheila Bellush that Petitioner had allegedly given to Rocha, Rocha had allegedly given to Gonzalez, and Gonzalez had given to Del Toro.[8] The Government

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photos, because I didn't have the photos with me, and I also had no gas in my truck. . . ." 21R85.

[7] Contrary to the Panel opinion at 35, Gonzalez never testified he "thought" the woman he saw was Sheila Bellush.

[8] Rocha had testified that Petitioner had given him one photo of Sheila Bellush, which he gave to Gonzalez, 16R99-103, whereas Gonzalez testified that Rocha had given him two such photos. 21R59, 85, 253-257. Moreover, although they both testified that the photo or photos, respectively, were similar to or even matched one of the photographs developed from negatives seized by the Government from Petitioner's residence, that testimony was rebutted by Virginia L'Heureux, a Government witness. L'Heureux (corroborated by Maureen Blackthorne and Petitioner) testified without contradiction that at some point years before 1997 (i.e, at or about the time of her marriage to Petitioner), Maureen Blackthorne had gone through Petitioner's box of photographs and extracted and threw out all photographs of Petitioner's prior girlfriends and ex-wife (Bellush). 19R318-19; 20R26-27, 42; 24R99-100; 25R155-159. This was why ten different photographs developed from negatives seized from Petitioner's residence were not physically in the box of photographs when it was seized at the residence by the Government.

needed corroboration of Rocha's testimony in this regard as the alleged photographs were never found.[9]

Additionally, the prosecutor argued the following to the jury:

> And Sammy Gonzalez told you they've been out there, they thought they saw her, but then they couldn't find her, where might she be. Now, we know that Sammy didn't see Sheila Bellush on that Saturday, because Sheila Bellush was still in Florida, she didn't come back till Sunday. But you can be confident he saw somebody. He probably saw a blond woman standing behind the Bellush house. And if you look at that photo from Jungle Jim's, about all you can tell is a young blond woman, and from the distance from the street to the back of the Bellush house, it would be hard to tell exactly who that person was. But you saw Pat Aday, the nosey neighbor. It could have been Pat Aday. 26R28-29.

This final argument, which attempted to fade the perjury while simultaneously giving credibility to the existence of photos, constituted improper personal opinion and attempted to mislead the jury away from the prosecutor's initial elicitation of the perjury.

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[9] No physical evidence was introduced linking Blackthorne to the crimes. In fact, Rocha's testimony that Petitioner directed him to have Gonzalez and Del Toro locate Bellush in Boerne, Texas, on or about September 10 (and at that time allegedly supplied the photograph or photographs and payment for the assault) was contradicted by the uncontested evidence that Petitioner was well aware, as of September 6, that Sheila Bellush had moved to Sarasota, Florida.

REASONS FOR GRANTING THE PETITION

1. The court of appeals' application of a non-constitutional harm standard to the erroneous admission of the civil deposition is in conflict with decisions of this Court and United States courts of appeal on the same important matter.

In his appellate brief, Petitioner asserted that the district court had committed reversible error by overruling his objections to the 1987 civil discovery deposition of Sheila Bellush. Petitioner pointed out that the Government's offer of that deposition under Rule 804(b)(1) had been objected to on the basis of a lack of similar motive, as mandated by Rule 804(b)(1) and that the introduction of the deposition would constitute a violation of the confrontation clause of the Sixth Amendment. 18R7-9. The Government's position was that "[t]he testimony was properly admitted" and "[b]ecause Rule 804(b)(1) is a 'firmly rooted exception' to the hearsay rule, admission of the deposition did not violate Appellant's confrontation right. *Mann*, 161 F.2d at 861 & n.57." Govt. Brief at 47-48 (relying upon *United States v. Mann*, 161 F.2d 840 (5th Cir. 1998)).

At pages 29 to 32 of its opinion, the Fifth Circuit concluded that the district court committed error by allowing the Government to introduce the deposition because the similar motive requirement of Rule 804(b)(1) had not been satisfied. The panel then undertook a harmless error analysis at pages 32 to 34 and employed the following test, quoting *United States v. Munoz*, 150 F.3d 401, 412-13 (5th Cir. 1998), *cert. denied*, 525 U.S. 1112 (1999): "Harmless error is [a]ny error, defect, irregularity or variance which does not affect substantial rights. It arises when the mistake fails to prejudice the defendant.

Prejudice occurs when the error ha[s] affected the outcome of the district court proceedings." The panel concluded that the error was harmless, finding that the deposition did not affect the outcome of the proceedings on the grounds that the evidence against Petitioner, introduced through Rocha and Gonzalez, was strong, and that the deposition material was cumulative in relation to the other evidence of prior threats.

The panel's *solitary* use of the above quoted standard was improper[10] and contrary to the standard announced by this Court in *Chapman v. California*, 386 U.S. 18, 24 (1967) and utilized in virtually every subsequent case addressing a Confrontation Clause violation. *See e.g.*, *Harrington v. California*, 395 U.S. 250, 254 (1969); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Coy v. Iowa*, 487 U.S. 1012, 1022 (1988). Under the standard mandated by this Court in *Chapman v. California, supra*, a violation of the Confrontation Clause is harmless if the prosecution can "prove beyond a reasonable doubt that the constitutional error complained of did not contribute to the verdict obtained."

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[10] Petitioner believes this is the first opinion of the Fifth Circuit wherein prior testimony has been held erroneously admitted in violation of Rule 804(b)(1) due to a lack of a similar motive. Numerous cases have held that prior testimony was properly admitted against the defendant, *see e.g.*, *United States v. Mann*, *supra* at 860 (5th Cir. 1998); *United States v. Tannehill*, 49 F.3d 1049, 1057 (5th Cir. 1995), or properly excluded against the government under Rule 804(b)(1). *See e.g.*, *United States v. Atkins*, 618 F.2d 366 (5th Cir. 1980); *United States v. Young Brothers, Inc., Contractors*, 728 F.2d 682 (5th Cir. 1984); *United States v. McDonald*, 837 F.2d 1287 (5th Cir. 1988). None of these cases addressed which harmless error standard should be employed, since no error was found.

The panel's refusal to address the question of constitutional harm is contrary to the required harm analysis applicable whenever Confrontation Clause violations are involved. *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1104 (5th Cir. 1981).[11] If a Rule 804(b) violation is found, the appellate court determines whether non-constitutional harm is present. If it is, there is no need to further inquire about constitutional dimensions. On the other hand, when the error under the Rule is deemed harmless, the appellate court must then determine if the Confrontation Clause has been violated. If the constitutional error is present, relief must be granted unless the "error is also harmless under the more demanding *Chapman* standard." *United States v. York*, 852 F.2d 221, 226-27 (7th Cir. 1988); *see United States v. McCleskey*, 228 F.3d 640, 645 (6th Cir. 2000); *United States v. Lang*, 904 F.2d 618, 625-26 (11th Cir. 1990); *United States v. McCall*, 740 F.2d 1331, 1338 (4th Cir. 1984) (Sprouse, C.J.); *Sarmiento-Perez*, *supra*.

When a defendant has challenged the out-of-court statement as violating both the rule and the Confrontation Clause, the reviewing court must find that two requirements have been met before holding that the district court did not violate the *Constitution* by admitting the evidence: (1) the prosecution must have shown that the out-of-court declarant was unavailable to testify despite its good faith

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[11] *United States v. Sarmiento-Perez*, *supra* (holding that the erroneously admitted co-defendant's confession added "critical weight" to the prosecution's case and, thus, "constituted reversible error as affecting the substantial rights of the accused even under the less rigorous standard provided for errors of less than constitutional magnitude" and, therefore, the court "need not" determine if it was "error of constitutional proportion" under *Chapman*).

efforts to obtain his or her presence at trial; and, (2) the prosecution must have shown that the out-of-court statements bore sufficient indicia of reliability to provide the jury with an adequate basis for evaluating their truth. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

Petitioner objected that the erroneous admission of the civil deposition material violated his rights under the Confrontation Clause. The declarant was unavailable. The panel itself suggested that the deposition was unreliable, because the deposition was produced "during contentious divorce proceedings" in which "Mrs. Bellush and Blackthorne were engaged in a bitter custody dispute." The panel found, under such circumstances, that there would be grounds to doubt the strength of the deposition declarant's "motive for veracity." Opinion at 33-34. However, although the issue had been clearly preserved and presented, after finding the non-constitutional error harmless, the panel did not proceed, as it was required, to make a finding regarding sufficient reliability of the deposition statements to safeguard Petitioner's Sixth Amendment right of confrontation. For the same reasons that the deposition statements were deemed "less credible" due to their utterance in contentious divorce proceedings, they should be deemed of insufficient reliability to pass muster under the Confrontation Clause. The deposition statements, furthermore, had a much greater potential to unfairly prejudice the jury than the other evidence of like character introduced at Petitioner's trial, because the jury would have recognized as significant that they were delivered under oath in a formal proceeding by the *victim* herself.

This Court should grant certiorari and establish a uniform rule with respect to reviewing evidence admitted in violation of Federal Rule of Evidence 804(b), when challenged on confrontation grounds. The appropriate inquiry should be: (1) whether the error is harmless under Federal Rule of Appellate Procedure 52(a); and if so, (2) whether a confrontation clause violation has occurred. If a confrontation clause violation has occurred, (3) is the error also harmless under the more demanding *Chapman* harmless-error standard. In the alternative, this Court should grant certiorari, vacate the Fifth Circuit's decision, and remand the case for the Fifth Circuit to decide (as it should have) whether constitutional error is present and whether such error is harmful under the *Chapman* standard.

2. The court of appeals' treatment of allegations of child sexual abuse made by the deceased against Petitioner as not subject to Federal Rule of Evidence 404(b), and as admissible for the jury to consider as to Petitioner's intent, is in conflict with decisions of this Court and United States courts of appeal on the same important matter.

The Fifth Circuit held at page 24 that the Government "did not seek to introduce evidence of prior bad acts," only *allegations* of the same. The panel also held that the Government was not required under Rule 404(b) to prove the truth of these allegations. These conclusions are contrary to the express requirement of this Court that such uncharged misconduct evidence must be relevant to be admissible under Federal Rule of Evidence 402, and this Court's holding that the relevance of the act depends

upon proof that the defendant did, in fact, commit the act. *United States v. Huddleston*, 485 U.S. 681, 684-85 (1988).[12]

Bellush accused Petitioner of illegal and immoral activity: sexually abusing one of their daughters. The question immediately raised by the allegations is whether they might bear any relevance to the case at all other than suggesting that Petitioner's character was such that it might have shown a propensity to participate in the charged offense. Thus, the allegations were properly subject to Rule 404(b) analysis, and the Fifth Circuit erred by holding otherwise. Although the panel appeared to agree with the district court's conclusion that the allegations were not subject to Rule 404(b), the panel also ignored the fact that the district court treated them as though they *were* subject to 404(b), instructing the jury with language from Fifth Circuit Pattern Jury Instruction 1.30 to the effect that it could not consider these prior "bad acts" as true, but only for "very limited purposes" pertaining to whether Petitioner had the "state of mind or intent" or a "motive to commit the act charged in the indictment." 4R795.

Had the panel recognized this, and accordingly applied *Huddleston* or the Fifth Circuit's *en banc* standard for 404(b) evidence in *Beechum*, it would have tested the

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[12] The panel's implicit distinction between **charged offenses** and **accusations** contradicts the express language of the same court of appeals in *United States v. Beechum*, 582 F.2d 898, 903 (5th Cir. 1978) (*en banc*), where the court held that the proper analysis under Rule 404(b) "applies whenever the extrinsic activity reflects adversely on the character of the defendant, regardless of whether that activity might give rise to criminal liability."

relevance of each of the three reasons the district court expressly allowed the jury to consider the abuse allegations. The panel only addressed motive, Opinion at 23-25, erroneously asserting that the Government offered the allegations only for motive, *Id.* at 23, which was directly contrary to the "Government's Brief Supporting Admission Of Prior Acts Evidence". 3R633-3R649 (the allegations were offered for all three reasons above). Moreover, the panel clearly failed to address Blackthorne's assertions (1) that the allegations were not relevant to **intent** (Appellant's Brief at 45-47), and (2) that the jury charge should not have allowed the jury to consider the allegations as to **intent**. (Appellant's Brief at 51-52).[13]

The Fifth Circuit and other circuit courts have maintained that, if the Government offers Rule 404(b) evidence to prove knowledge or intent, the defendant can avoid introduction of the evidence if his defense is that "he did not do the charged act at all." *United States v. Jemal*, 26 F.3d 1267, 1273 (3rd Cir. 1994) (quoting *United States v. Ortiz*, 857 F.2d 900, 903 (2nd Cir. 1988); citing *United States v. Silva*, 580 F.2d 144, 148 (5th Cir. 1978); *United States v. Jenkins*, 7 F.3d 803, 807 (8th Cir. 1993); *United States v. Palmer*, 990 F.2d 490, 495 (9th Cir. 1993)); *see United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975) (prior

[13] The Fifth Circuit addressed the jury issue at pages 40-41 of its opinion, but failed to address this particular assertion, failed to acknowledge that the district court's charge itself had used the term "bad acts", and failed to acknowledge that the Government's proposed limiting instruction on the abuse allegations was virtually identical to Fifth Circuit Pattern Jury Instruction 1.30, as reflected in the "Government's Brief Supporting Admission Of Prior Bad Acts Evidence." 3R633 at 48-49.

misconduct not admissible under the intent exception to the general rule because intent was not an issue).

The Seventh Circuit has held, in contrast, that "[i]n cases involving specific intent crimes, intent is automatically an issue, regardless of whether the defendant has made intent an issue in the case." *United States v. Mazzanti*, 888 F.2d 1165, 1171 (7th Cir. 1989) (citation omitted). The Fourth Circuit has taken an intermediate approach, holding that "the use of prior bad acts evidence must be examined meticulously in each case" and implying strongly that "the probative value of prior bad acts evidence is significantly less when the defense is that the defendant did not performed the charged act at all." *Jemal*, 26 F.3d at 1273 n.3 (citing *United States v. Hernandez*, 975 F.2d 1035, 1040 (4th Cir. 1992)). Finally, several circuits recently have noted that this Court's decision in *Old Chief v. United States*, 519 U.S. 172 (1997), may have impliedly overruled the *Jemal-Ortiz-Silva-Jenkins-Palmer* line of cases. *See United States v. Hill*, 249 F.2d 707, 712-13 (8th Cir. 2001) (holding that the defendant's attempt – through stipulation – to remove intent as an issue in the case did not lift the government's burden of proving intent nor make intent any less relevant) (citing for same proposition *United States v. Williams*, 238 F.3d 871, 876 (7th Cir. 2001); *United States v. Bilderbeck*, 163 F.3d 971, 977-78 (6th Cir. 1999); *United States v. Queen*, 132 F.3d 991, 997 (4th Cir. 1997)).

The circuits are divided and confused over the question of the admission of prior bad act evidence in this context. *Hill*, 249 F.2d at 710 (citing 2 J. Weinstein & M. Berger, *Weinstein's Federal Evidence* Section 404.22(1)(b) n.13 (Joseph M. McLaughlin ed., 2d ed. 2000) (listing different circuit approaches)). According to the reasoning

of some circuit decisions, the accusations of sexual abuse were inadmissible as to simple knowledge or intent because Petitioner's defense was that he did not do the charged acts (aiding and abetting interstate spousal violence or conspiracy to use interstate commerce facilities in the commission of murder-for-hire), nor asked Rocha to kill or hurt Sheila Bellush. 24R115. However, the Government was required to prove a specific intent in relation to each of the charged offenses: (1) under 18 U.S.C. 2261(a)(1), "intent to injure . . . that person's spouse or intimate partner," and (2) under 18 U.S.C. 1958(a), "intent that a murder be committed." Thus, pursuant to the view of other circuit decisions, *supra*, intent would have been at issue and automatically embraced by Rule 404(b) in Petitioner's case.[14]

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[14] If intent was properly at issue, the failure of the district court and the Fifth Circuit to assess the admissibility of the sexual abuse allegations in light of: (1) the direct testimony of Daniel Rocha bearing upon Petitioner's intent; and (2) the lack of similarity between the intent to commit sexual abuse of a third party and the intent mandated by the two statutes Petitioner allegedly violated, was inexcusable. As stated in *Beechum*, *supra* at 914-915:

> Probity in this context is not an absolute; its value must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference. It is the incremental probity of the evidence that is to be balanced against its potential for undue prejudice. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S.Cal.L.Rev. 220, 234-35 & n.52 (1976); See *United States v. Baldarrama*, 566 F.2d 560, 568 (5th Cir. 1978). Thus, if the Government has a strong case on the intent issue, the extrinsic offense may add little and consequently will be excluded more readily. See, e.g., *United States v. Lawrance*, 480 F.2d 688, 691-92 n.6 (5th Cir. 1973). If the defendant's intent is not contested, then the incremental

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Whether or not intent was at issue ("probative of a material issue other than character"), *Huddleston*, 485 U.S. at 686, the relevance requirement of Rule 402 was not met, *id.* at 686-87, because the Government did not even attempt to prove that the allegations of sexual abuse were factually based. Absolutely no evidence was produced by the Government to support a finding that the sexual abuse occurred, and Petitioner was strictly prohibited by the district court from putting on evidence that would have unequivocally proven that Petitioner did not commit any acts of sexual abuse.

In order for the evidence to be relevant as to intent, the Government had to proffer sufficient evidence that the sexual abuse allegations were factually true. *Huddleston*,

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probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded. E.g., *United States v. Kirk*, 528 F.2d 1057, 1060-61 (5th Cir. 1976); *United States v. Goodwin*, 492 F.2d 1141, 1151 (5th Cir. 1974). In measuring the probative value of the evidence, the judge should consider the overall similarity of the extrinsic and charged offenses. If they are dissimilar except for the common element of intent, the extrinsic offense may have little probative value to counterbalance the inherent prejudice of this type of evidence. Of course, equivalence of the elements of the charged and extrinsic offenses is not required. But the probative value of the extrinsic offense correlates positively with its likeness to the offense charged. Whether the extrinsic offense is sufficiently similar in its physical elements so that its probative value is not substantially outweighed by its undue prejudice is a matter within the sound discretion of the trial judge. The judge should also consider how much time separates the extrinsic and charged offenses: temporal remoteness depreciates the probity of the extrinsic offense. E.g., *United States v. Carter*, 516 F.2d 431, 434-35 (5th Cir. 1975) (footnotes omitted).

485 U.S. at 689. It had to show that the "jury [could] reasonably conclude that the act[s] occurred and that the defendant was the actor." *Id.* (citing *Beechum*, 582 F.2d at 912-13); *accord United States v. Ridlehuber*, 11 F.3d 516, 522-23 (5th Cir. 1993);[15] United *States v. Lemaire*, 712 F.2d 944, 947 (5th Cir. 1983); *United States v. Brown*, 608 F.2d 551, 555 (5th Cir. 1979). Since the Government did not even try to prove that Petitioner committed the acts of sexual abuse, as alleged by Bellush, they were not relevant **as to intent** and therefore improperly introduced and admitted. Additionally, the district court's instruction allowing the jury to consider them in relation to Petitioner's intent was improper. The panel failed to even address the district court's inaccurate instruction (complained of at page 51-52 of the appeal brief).[16]

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[15] In *Ridlehuber*, the Fifth Circuit held that, where the Government ***"did not prove, or attempt to prove"*** that the defendant committed the extrinsic offense, the "evidence [was] not sufficient under Rule 104(b) to show that [the defendant] committed the extrinsic offense [and, therefore,] the trial court should have excluded the [evidence that was used to suggest that the defendant committed an extrinsic offense]." *Ridlehuber*, 11 F.3d at 523.

[16] The error in the principal instruction was compounded by a supplemental instruction from the district court responding to a jury question about state of mind. This was addressed in issue 12 of petitioner's appellate brief. On the fourth day of jury deliberations, the jury sent out note 15, which stated: "Can have instruction on state of mind?" 4R843. The term "state of mind" was used by the court in its cautionary instructions on threats, allegations of sexual abuse, 4R795-496, and in the definition of "intent". 4R811. Over Petitioner's numerous objections, 26R120-123, the district court informed the jury that "[s]tate of mind means 'intent' or 'knowingly' as those terms have been used in these instructions." 4R844.

The term "state of mind" is defined by Black's Law Dictionary (Sixth Edition, 1990 at p. 1409) as "[a] person's reasons and motives for

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The moment the district court became aware that the Government would not attempt to prove that the alleged sexual abuse was committed by Petitioner, it could not characterize the accusations as evidence that was "conditionally relevant" and, therefore, admissible as potentially bearing upon Petitioner's intent. *Huddleston*, 485 U.S. at 690 & n.7.[17] In such instances, wherein the Government has no means to prove that its proffered evidence is relevant, the district court must bar admission of the evidence, respecting the policy that the jury should be shielded from uncharged misconduct unless the conditions for admissibility are met.

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acting as he did. Term used in connection with evidence. See Mens rea; Mental State; State of Mind exception."

As such, the supplemental instruction given by the district court was not accurate. Petitioner's substantial rights were violated because the jury was not informed that state of mind was more than just "intent" or "knowingly." Indeed, the jury was not informed that a person's state of mind could change and that there were factors other than just knowledge and intent that operated to comprise a person's state of mind. Petitioner's substantial rights were further violated because, by giving the supplemental instruction, the district court specifically allowed the evidence of allegations of sexual abuse to be used to determine Petitioner's intent.

[17] This Court noted in *Huddleston* that "the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been proffered to permit the jury to make the requisite finding." 485 U.S. at 690. The rationale is that when "an item of evidence is conditionally relevant, it is often not possible for the offeror to prove the fact upon which relevance is conditioned at the time the evidence is offered. In such cases, it is customary to permit him to introduce the evidence and 'connect it up' later." *Id.* at n.7. However, there was no "conditional relevancy" to the accusations against Petitioner where the Government made clear that it *would not* later introduce proof of the preliminary facts (the alleged sexual assaults). *Id.*

This Court should grant certiorari to resolve the question whether evidence of the defendant's prior bad acts may be admissible under Rule 404(b) to prove intent when there is direct evidence of intent and the defendant makes no issue of his intent or stipulates that his intent is not at issue. Additionally, if prior bad acts are inadmissible to show intent under some circumstances, this Court should grant certiorari to determine whether such acts nevertheless would be admissible when an element of the offense requires a specific intent finding. Alternatively, this Court should grant certiorari, hold that the Fifth Circuit's decision is contrary to this Court's standard for relevancy in *Huddleston*, vacate the decision, and remand the case for a proper examination under *Huddleston* as to whether the district court abused its discretion by (a) admitting the accusations of sexual abuse and/or (b) instructing the jury that it could consider those allegations as relevant to Petitioner's intent to commit the charged offenses.

3. The court of appeals' reliance upon an incorrect standard of materiality in the context of the Government's intentional or knowing use of perjured testimony is in conflict with decisions of this Court and United States courts of appeal on the same important matter.

Petitioner asserted that his rights to due process were violated by the prosecutor's knowing and intentional elicitation of perjured testimony from Sammy Gonzalez. The Fifth Circuit concluded at pages 34 to 35 of its opinion that Gonzalez' perjured testimony, elicited on direct examination by the Government, was not material because Petitioner's attorneys corrected the perjury on cross-examination, citing *United States v. O'Keefe*, 128 F.3d 885,

893 (5th Cir. 1997), *cert. denied*, 523 U.S. 1078 (1998) (*O'Keefe I*). According to the panel, a statement is "material" under *O'Keefe I* if there is a "reasonable probability of a different outcome," *Id.* at 894, and because Petitioner's attorneys corrected the perjury, it was not material.

Petitioner's panel used an incorrect standard of materiality.[18] The proper standard of materiality when the Government intentionally or knowingly elicits false testimony is that "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" *United States v. Bagley*, 473 U.S. 667, 678-79 (1985); *United States v. Agurs*, 437 U.S. 97, 103 (1976); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264, 271 (1969); *see Strickler v. Greene*, 527 U.S. 263, 296, 298-99 (1999) (Souter, J., concurring in part and dissenting in part). This Court explained in *Bagley* that this more onerous standard for the Government results from the fact that the Government has indulged in prosecutorial misconduct and, more importantly, that the error "involves 'a corruption of the truth-seeking function of the trial process.'" *Bagley*, 473 U.S. at 679-80. The standard is "equivalent to the *Chapman* harmless-error standard." *Id.* at 679 n.9. The Government, therefore, should have been required in Petitioner's case to "prove beyond a reasonable doubt that the error complained of did not contribute to

[18] Fifth Circuit Judge Dennis also has argued the standard in *O'Keefe I* was incorrect and contrary to this Court's precedent. *See United States v. O'Keefe*, 169 F.3d 281, 293 (5th Cir. 1999) (Dennis, J., dissenting from decision denying bail on appeal) (*O'Keefe II*) ("Prior to *O'Keefe I* this Circuit has consistently followed *Napue* and *Giglio*.").

the verdict obtained." *Id.* (quoting *Chapman*, 386 U.S. at 24); *see Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991); *Brown v. Wainwright*, 785 F.2d 1457, 1463 (11th Cir. 1986); *United States v. Jackson*, 780 F.2d 1305, 1312 (7th Cir. 1986); *United States v. Butler*, 567 F.2d 885, 892 (9th Cir. 1978); *Dupart v. United States*, 541 F.2d 1148, 1150 (5th Cir. 1976); *Bragan v. Morgan*, 791 F. Supp. 704, 714 (M.D. Tenn. 1992); *but see United States v. Boyd*, 55 F.3d 239, 245 (7th Cir. 1995) (appearing to suggest that unitary "reasonable probability" of acquittal standard is required for *Giglio/Napue* and *Brady* issues) (citing *Kyles v. Whitley*, 514 U.S. 419, 430-437 (1995)).

The Fifth Circuit's detour from *Giglio* and *Napue* in *O'Keefe* may be attributed to the highly complicated facts that place *O'Keefe* somewhere near the fault line between the *Giglio/Napue* false testimony standard and the *Brady* suppression standard. The facts in the opinion are difficult to interpret, as to whether, *inter alia*, (1) the prosecutors might have told the witness not to volunteer impeaching information, but to testify truthfully if asked about it, violating *Alcorta*;[19] (2) the prosecutors set up the defense to possibly elicit false testimony from the prosecution witness on cross-examination (and then made no effort to correct it), violating *Napue*;[20] or (3) the prosecutors suppressed their knowledge of the falsity of one of the witness' prior

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[19] *Alcorta v. Texas*, 355 U.S. 28 (1957) (granting relief where prosecutor had told witness not to volunteer impeaching information, but to answer truthfully if asked about it, and prosecutor was fully aware this would create a false impression as to a material fact).

[20] The Government has a duty to correct false evidence whenever it is offered. *Napue*, 360 U.S. at 269.

accusations against the defendant, essentially violating *Brady* (although with a high level of intent).[21]

There is no such ambiguity in Petitioner's case, wherein the Government intentionally elicited, in its case-in-chief,[22] the false testimony recognized by the Fifth Circuit panel. The prosecutors knew that Petitioner's counsel had the information needed to prove that Gonzalez' testimony about seeing Sheila Bellush was false. They reasonably would have believed that the defense would use it to impeach Gonzalez' testimony. The prosecutors elicited the testimony anyway, knowing that it was false *and that the defense likely would impeach it*. The record suggests the prosecutors needed something that would corroborate Rocha's testimony that Petitioner gave him photographs of Sheila Bellush, and thereby connect *Petitioner* to the offense. The Government used the implication that Gonzalez and Del Toro *might have found Bellush*, using photograph(s) from Petitioner, to make it appear as though an evidentiary gap (no corroboration of the photographs' existence) had been filled. The presentation of the false testimony and follow up argument create

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[21] The Government has a duty to inform the defense of material, impeachment evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[22] The Fifth Circuit denied relief in *O'Keefe* in part on the grounds that whatever false testimony may have been uttered in that case "occurred as a result of the defense's cross-examination, not from testimony elicited by the prosecution." *O'Keefe I*, 128 F.3d at 896 (citing *United States v. Adebayo*, 985 F.2d 1333, 1341-42 (7th Cir. 1993)). Such a rationale is contrary to this Court's decisions in *Napue* and *Giglio*, which both involved perjury by a prosecution witness during cross-examination by the defense. *Napue*, 360 U.S. at 267-68 & n.2; *Giglio*, 405 U.S. at 153. *O'Keefe* may not reasonably be considered relevant to Petitioner's case, wherein the error was intentionally injected by the Government in the case-in-chief.

and reinforce the impression that Petitioner *caused* Bellush ultimately to be found through the use of photographs Rocha claimed Petitioner had supplied. The Government compounded the prejudicial effect of this false testimony by glossing over Gonzalez' apparent willingness to say whatever was needed (e.g., that they actually saw Bellush) with the observation (during final argument) that Gonzalez "thought" they saw Bellush.

The strict *Giglio/Napue* standard was required because the Government's intentional elicitation of Gonzalez's false testimony "corrupt[ed] the truth-seeking function of the trial process," whether or not the defense had the opportunity to "correct" the false impression on cross-examination. *Agurs*, 427 U.S. at 104.[23] The Government has a duty not to elicit, or fail to correct, even perjury that is known to the defense. *DeMarco v. United States*, 928 F.2d 1074, 1075-77 (11th Cir. 1991); *United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977); *Ely v. Matasanz*, 983 F. Supp. 21, 41 (D. Mass. 1997).[24] In

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[23] This is not a case in which the Government gave the defense a late opportunity to correct false testimony by exercising its duty to reveal it. *See, e.g., Beltran v. Cockrell*, 294 F.3d 730, 736 (5th Cir. 2002). Quite the opposite. The Government intentionally or knowingly presented the false testimony, with no effort at correction; allowed the defense to impeach it; and, then, capitalized on its witness' false testimony in closing argument in order to tie Petitioner to the offense.

[24] Some circuits hold that, if it is established that the government knowingly permitted the introduction of false testimony, reversal is "virtually automatic." *See United States v. Wallach*, 935 F.2d 445, 456 (2nd Cir. 1991) (quoting *United States v. Stofsky*, 527 F.2d 237, 243 (2nd Cir. 1975)). One commentator has noted, "Why would an attorney risk his entire career and expose himself to a possible criminal charge to introduce false evidence that was incidental to guilt or innocence? While theoretically possible, it is highly improbable that the knowing use of perjured testimony would be harmless error." Peter J. Henning,

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Sanfilippo, the Government advised defense counsel by letter weeks prior to the trial regarding a witness who would testify in return for leniency in another case. On cross-examination, defense counsel futilely attempted to elicit the terms of that deal from the witness. The Government knew that his testimony was false. The Government did not step forward to set the record straight and, in fact, argued in closing that the false evidence was relevant to the jury's decision. *Sanfilippo*, 564 F.2d at 178-79. The Fifth Circuit held that the tools available to defense counsel did not relieve the Government of its responsibilities under *Giglio*, and that the Government's actions required vacation of the conviction.

The failure to apply the proper *Giglio/Napue* standard necessitates a new trial. Under that standard, there is more than a likelihood that the perjured testimony could have affected the outcome of the trial. The credibility of Rocha and Gonzalez were the key to this case and the evidence was not otherwise overwhelming. In fact, the jury deliberated 33 hours over the course of five days before returning a verdict. Accordingly, this Court should grant certiorari to determine whether the *Giglio/Napue* materiality standard applies when the prosecution intentionally elicits false testimony, even though it is aware that the defense knows the testimony is false. In the alternative, this Court should grant certiorari, hold that the Fifth Circuit's decision is contrary to the standard for materiality required by this Court for assessing the harm of a prosecutor's knowing use of false testimony, vacate the

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Prosecutorial Misconduct and Constitutional Remedies, 77 Wash. U. L. Q. 713, 763 n.196 (1999).

Fifth Circuit's opinion, and remand the case to the panel for a proper assessment of the materiality of Gonzalez' false testimony by determining whether it "could . . . in any reasonable likelihood have affected the judgment of the jury" or, in other words, whether the Government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

4. The court of appeals' rejection of this Court's harm and materiality standards so far departs from the usual course of judicial proceedings, and sanctions such a departure by the lower courts, as to call for an exercise of this Court's supervisory power.

This Court strictly supervises the administration of criminal justice in the federal courts so as to guard against misuse of the law enforcement process and "prevent disregard of cherished liberties." *McNabb v. United States*, 318 U.S. 332, 343 (1943). Certiorari should be granted in this case as an exercise of supervisory power, because the Fifth Circuit so broadly disregarded this Court's directions for appropriate appellate review of the issues. Our system depends upon "the learning, good sense, fairness and courage of federal trial judges." *Id.* (quoting *Nardone v. United States*, 308 U.S. 338, 342 (1939). The Fifth Circuit not only failed to fairly apply the standards of harm and materiality established by this Court, but allowed the district court to aggressively undermine the fairness of Petitioner's trial by preventing him from putting on evidence to demonstrate the falsity of the sexual abuse allegations. The district court thereby was permitted to govern the admission of evidence in a way that undermined fairness. The evidentiary rules should not be

employed in a way that mischaracterizes this Court's precedents, obfuscates the issues, and ignores the practical realities of unfair prejudice in a criminal trial.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID L. BOTSFORD
Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-51256

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALLEN BLACKTHORNE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-00-CR-3-ALL)

(Filed May 3, 2002)

Before DUHÉ, BARKSDALE, and DENNIS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

For Allen Blackthorne's numerous challenges to his conviction for, *inter alia*, conspiracy to use interstate commerce facilities in the commission of murder for hire, primarily at issue are evidentiary rulings concerning: portions of the victim's (Blackthorne's former wife's) deposition in her divorce proceeding against him, in which she recounted threats Blackthorne made against her; and other evidence of threats against the victim, as well as her allegations that Blackthorne sexually abused one of their children.

Blackthorne also contends: the evidence is insufficient to support his convictions; extrinsic evidence of prior inconsistent statements by a key Government witness should have been admitted; the Government elicited false testimony from another key Government witness; a mistrial should have been declared; the jury instructions were erroneous; and an evidentiary hearing should have been held to consider his new trial motion. **AFFIRMED.**

I.

In November 1997, Sheila Bellush, Blackthorne's former wife, was murdered in her home in Sarasota, Florida. Blackthorne and Mrs. Bellush married in 1983. As early as 1985, he began threatening her, saying: if she ever left him, he would either kill her or have her killed; he would have her "taken care of"; her face would be maimed and she would never walk again; and he was in a position to have another person do this.

In 1987, Mrs. Bellush and Blackthorne divorced; she was awarded custody of their two daughters. The ten years following their divorce involved a bitter and protracted battle over custody and child support. Blackthorne

withheld child support payments; and, in 1990, without Mrs. Bellush's knowledge, he secured a reduction in his support obligations In 1991, he attempted to obtain custody; Mrs. Bellush, to increase his support obligations.

During the litigation, the two exchanged accusations. Blackthorne claimed she physically and psychologically abused their daughters; Mrs. Bellush, that he sexually abused one of them. Blackthorne failed in his custody attempt; his support obligations were increased; and this made him "angry" and "upset".

Blackthorne against made threats against Mrs. Bellush. In one instance, while she was visiting her daughters at Blackthorne's home, she and Blackthorne discussed the murder of her friend; according to Mrs. Bellush, it had been committed by her friend's husband. Blackthorne told Mrs. Bellush that the victim "pissed [her husband] off and she got what she deserved". He warned her: "Don't ever piss me off because the same thing will happen to you".

In another instance, Blackthorne told one of his daughters that he "hated" Mrs. Bellush, and he "wanted her dead". He also confided in a co-worker that "he had the contacts to have [Mrs. Bellush] taken to Mexico and she wouldn't return".

In 1997, Mrs. Bellush, who had remarried, refused to allow Blackthorne visitation. In attempting to enforce such rights, Blackthorne accused Mrs. Bellush and her husband of physically abusing one of their daughters. Mrs. Bellush, in turn, again accused Blackthorne of sexual abuse and sought to have Blackthorne's visitation privileges ended. Blackthorne again sought custody.

A hearing was held in July 1997, described by the presiding judge as "very acrimonious", with Blackthorne and Mrs. Bellush interested only in "settl[ing] the score" with each other and neither having the children's best interests in mind. When the judge suggested that both families receiving counseling, Blackthorne relinquished his paternal rights. According to Blackthorne's secretary, he complained that, in all of the court proceedings, Mrs. Bellush had made the same false child abuse accusations.

That same month (July 1997), while on a trip with Danny Rocha, a bookie and golf companion, Blackthorne complained to Rocha that Mrs. Bellush was abusing their children; Blackthorne asked Rocha whether he knew anyone who would kill her. Rocha responded he did not, but that "if [Blackthorne] wanted to have her beat[en] up, [he] could probably get someone to do that".

Blackthorne decided "that beating her would be a better way of going about stopping her and asked [Rocha] if [he] would help him find someone to do it". As for the severity of the beating, Blackthorne told Rocha that he wanted Mrs. Bellush "crippled in a wheelchair with no tongue". Blackthorne assured Rocha that, if he would "handle the situation" with Mrs. Bellush, he would give him a 25 percent ownership interest in a golf course he planned to build.

The next month (August), Blackthorne asked Rocha if he had found anyone to do what they had discussed; Rocha replied that he had someone in mind, but had not contacted him. Later in August, Rocha approached a friend, Sammy Gonzales, and asked him to find a person willing to assault Mrs. Bellush, That September, after disagreeing

with Rocha over a price and who should pay it, Blackthorne agreed to pay $4,000. He gave Rocha the money, as well as Mrs. Bellush's photograph and address in Boerne, Texas.

Rocha convinced Gonzales to hire someone to commit the assault, stating: Blackthorne would pay $5,000; and Gonzales could pay $4,000 and keep $1,000. Rocha gave Gonzales $4,000, Mrs. Bellush's picture and address, and promised to pay the remaining $1,000 later.

That same month, after hitting one of her daughters with her belt, Mrs. Bellush was arrested for child abuse; the daughter was placed in a shelter. The next day, Mrs. Bellush was released. She, her husband, and the rest of their family moved from Texas to Sarasota, Florida, leaving the daughter in the shelter. The State of Texas moved to place the daughter in foster care and a hearing was set for 15 September 1997.

On 12 September, Gonzales unsuccessfully attempted to locate Mrs. Bellush's Texas home. He tried again the next morning, calling Rocha for directions. Rocha obtained the directions from Blackthorne and relayed them to Gonzales.

After receiving the directions, Gonzales enlisted his cousin, Joey Del Toro, to assault Mrs. Bellush for $3,000. That same day, as they drove past Mrs. Bellush's former house, Gonzales recognized a woman he believed to be Mrs. Bellush, but she left before Del Toro could attack her.

Mrs. Bellush returned to San Antonio on 14 September to attend her daughter's custody hearing. The next day, Mrs. Bellush regained custody and they returned to Florida. That same day, however, Gonzales and Del Toro

continued to look for Mrs. Bellush; when they could not find her, Gonzales again called Rocha for assistance.

Rocha, in turn, called Blackthorne, who informed him that, because there had been a hearing that day, they should look for Mrs. Bellush at her attorney's office. Rocha relayed this information to Gonzales and Del Toro; but after driving to the office, they did not find her.

After Mrs. Bellush moved to Florida, fearing Blackthorne, she tried to prevent him from locating her. She used Mail Boxes, Etc. to receive her mail; placed title to her home in a different name; and forbade her daughters from contacting him. Blackthorne, however, made considerable efforts to locate her. He had his secretary attempt to obtain the address from Mrs. Bellush's church in Florida and asked one of his business associates to follow her home from church. Eventually, through the services of a private investigator, Blackthorne obtained her new (Florida) address.

After Mrs. Bellush regained custody of her daughter in mid-September 1997, Blackthorne complained to Rocha that Mrs. Bellush had "beat" the child abuse case and offered Rocha $50,000 if he got his children back, telling Rocha that "the guys" should "use their imagination". When Rocha asked "what happens if she dies", Blackthorne responded: "So be it". He then told Rocha that the best way for them to receive the $50,000 was "if no one finds the body" and further instructed them to "dump her in the ocean or bury her in the woods".

Rocha told Gonzales that Blackthorne "wants to get it done" and that Blackthorne was offering a $10,000 "incentive" if he got his daughters back. (Rocha, intending to keep $40,000 for himself, reduced the incentive to

$10,000.) Gonzales told Rocha, and Rocha acknowledged, that Mrs. Bellush "might die of her injuries". Gonzales did not then commit to go to Florida, and did not commit for Del Toro. Subsequently, Rocha continued to pressure Gonzales to contact Del Toro.

On 4 November 1997, Gonzales arranged for Rocha and Del Toro to meet. Rocha told Del Toro he would be paid $4,000 to go to Florida and assault Mrs. Bellush, but that Blackthorne would also pay $10,000 if he regained custody of his daughters. When Del Toro observed that such a beating could be fatal, Rocha responded Blackthorne was aware of that. And, upon Del Toro's asking how to get the $10,000, Rocha replied the "easiest way . . . is just to shoot her". Rocha also told Del Toro that, if he did this job, he would have future employment for him.

Del Toro then asked Rocha and Gonzales if they knew where he could obtain a gun. They told him they did not. Rocha gave Del Toro $500, agreeing to pay an additional $3,500 when he returned; he also gave him Mrs. Bellush's address, which he had received from Blackthorne. Rocha also conveyed to Del Toro Blackthorne's suggestion that there was a strip center near Mrs. Bellush's house where Del Toro could park and walk to Mrs. Bellush's home; he told Del Toro that he should wear casual clothes and that it would be best to do it in the daytime, while Mrs. Bellush's husband was absent.

After obtaining a gun, Del Toro left Texas for Florida on 5 November. He called Gonzales and asked him to tell Rocha he was "on his way". Rocha relayed this information to Blackthorne. On 6 November, Del Toro reported to Gonzales that he had arrived in Florida, had found Mrs. Bellush's house, and was waiting for the best opportunity.

Del Toro murdered Mrs. Bellush in her home on 7 November. He attacked her in the laundry room, shooting her once in the face with a .45 caliber pistol, striking her head with the gun butt, and slashing her throat with a knife. A trail of blood showed Mrs. Bellush dragged herself into the kitchen and collapsed, trying to telephone for help before bleeding to death. Her daughter arrived home from school to find her dead and Mrs. Bellush's 23-month-old quadruplets alone in the house.

Del Toro fled Florida, called Gonzales to tell him he had killed Mrs. Bellush, and asked Gonzales to contact Rocha because he needed money – the remaining $3,500, plus $3,000 of the "incentive". Gonzales notified Rocha, who gave him $3,500 to give to Del Toro.

The night of the murder (7 November), Rocha went to see Blackthorne. After learning Mrs. Bellush had been killed in her home, Blackthorne told Rocha they had "messed up", because they had not followed his directive to dispose of her body so that it would not be found. When Rocha asked Blackthorne for $3,000, as partial payment of the incentive, Blackthorne responded "he didn't have it on him".

Gonzales gave Del Toro $3,500 the next day, and Del Toro described to him how he had murdered Mrs. Bellush: he entered through a window, shot her, and then stabbed her with a kitchen knife when his gun jammed. Del Toro fled to Mexico on 11 November.

Blackthorne met Rocha the same day and gave him $10,000. Rocha confirmed for Blackthorne the accuracy of a sketch of Del Toro that had appeared on television. Blackthorne told Rocha not to say anything, and that "if anybody gets in trouble, . . . [Blackthorne would] hire

lawyers for everybody". Rocha paid the $10,000 to an attorney after he learned Del Toro had fled.

In January 2000, Blackthorne was charged, under 18 U.S.C. § 1958(a), with conspiracy to use interstate commerce facilities in the commission of murder for hire, and, under 18 U.S.C. §§ 2(b), 2261(a)(1) and (b)(1), with causing another to cross state lines to commit domestic violence. Trial commenced on 12 June 2000; and, after the testimony of, *inter alia*, Rocha and Gonzales, Blackthorne was convicted on 6 July. He was sentenced to concurrent life sentences.

II.

Primarily at issue are the evidentiary rulings regarding Mrs. Bellush's divorce deposition and evidence of Blackthorne's prior threats against Mrs. Bellush, as well as her accusations that he sexually abused their daughter. Blackthorne presents numerous other issues.

A.

Blackthorne, who testified, contends the evidence is insufficient to support his convictions for causing Del Toro to cross state lines to commit domestic violence and for conspiring to use interstate commerce facilities in the commission of a murder for hire. Blackthorne having timely moved for judgment of acquittal, "we view the evidence in the light most favorable to the jury verdict and will affirm if a rational trier of fact could have found that the government proved all essential elements of the crime beyond a reasonable doubt". ***United States v. Lankford***, 196 F.3d 563, 575 (5th Cir. 1999) (internal quotation marks omitted), ***cert. denied***, 529 U.S. 1119 (2000). All

reasonable inferences must be drawn in favor of the verdict, with "credibility determinations [being] the sole province of the jury". ***See United States v. Cathey***, 259 F.3d 365, 368 (5th Cir. 2001). Accordingly, it was for the jury to make credibility calls concerning the conflicting testimony presented by Blackthorne and the Government's witnesses, especially Rocha and Gonzales.

1.

A violation of 18 U.S.C. § 2261(a)(1) occurs where:

> A person . . . travels across a State line . . . with the intent to injure . . . that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner. . . .

Of course, for aiding and abetting, "[w]hoever willfully causes an act to done which if directly performed by him . . . would be an offense against the United States, is punishable as a principal". [sic] 18 U.S.C. § 2(b).

Blackthorne does not contest the sufficiency of the evidence regarding the elements of § 2261(a)(1). Instead, he maintains it is insufficient for his causing Del Toro to cross a state line and injure Mrs. Bellush. According to Blackthorne, neither his $4,000 payment nor the $50,000 incentive caused Del Toro to travel to Florida.

Instead, Blackthorne contends that Del Toro agreed to travel to Florida to assault Mrs. Bellush only after Rocha assured Del Toro he would give him work in the future. According to Blackthorne, this employment assurance, not

the monetary incentives he made available, was why Del Toro agreed to Go to Florida.

Blackthorne construes § 2(b)'s causation requirement too narrowly. The monetary inducements do not have to be the exclusive cause of del Toro's violation of § 2261(a)(1). ***See United States v. Levy***, 969 F.2d 136, 141 (5th Cir.) (a requirement that the defendant be the sole cause of the act "would render . . . § 2(b) meaningless"), *cert. denied sub nom.* 506 U.S. 1040 (1992). Instead, § 2(b) covers anyone who "puts in motion or assists in an illegal enterprise". ***United States v. Smith***, 584 F.2d 731, 734 (5th Cir. 1978).

The Government contends that Blackthorne's $50,000 incentive put Del Toro in motion. According to the Government, only because Rocha reduced the incentive from $50,000 to $10,000 did he offer Del Toro future work.

We agree that Blackthorne's payment offers put in motion Del Toro's traveling to Florida to assault Mrs. Bellush. Rocha's reducing the incentive for his personal gain does not diminish Blackthorne's culpability. The $50,000 incentive caused Rocha to recruit Del Toro and was, thus, a cause of Del Toro's committing the act.

Furthermore, Rocha's future employment assurance was not the sole cause of Del Toro's accepting the assignment. The money was just as, if not more, important in Del Toros decision to murder Mrs. Bellush. On their way to meet Rocha, Gonzales told Del Toro: "Danny [Rocha] wants to know if you want to go to Florida". Del Toro replied: "Well, I don't know. *About how much are they willing to pay*". (Emphasis added.) While meeting with Del

Toro, Rocha asked whether he was "[r]eady to go to Florida"; in response, Del Toro wanted "to know *how much money* [Rocha] was going to pay". (Emphasis added.)

Viewing the evidence in the light most favorable to the verdict, a rational juror could have found that Blackthorne's monetary inducements were a cause of Del Toro's traveling to Florida to commit murder; and that, accordingly, causation was proved beyond a reasonable doubt.

2.

Blackthorne also contends the evidence is insufficient that he conspired to use interstate commerce facilities in the commission of murder for hire. Its elements are: "(1) traveling or causing another to travel in interstate . . . commerce . . .; (2) with the intent that a murder be committed . . .; and (3) as consideration for the receipt of pecuniary value". ***United States v. Sharpe***, 193 F.3d 852, 863-64 n.6 (5th Cir. 1999), *cert. denied*, 528 U.S. 1173 (2000); *see* 18 U.S.C. § 1958(a).

Blackthorne's argument is threefold: there was an agreement between him, Rocha, Gonzales, and Del Toro only to have Mrs. Bellush beaten, not to have her killed; his payment offers did not cause del Toro to commit the murder; and Del Toro departed the 4 November meeting with Rocha and Gonzales with the option of beating Mrs. Bellush for $4,000, or harming her severely for $10,000, thereby absolving Blackthorne.

As for Blackthorne's contention that he did not intend for Mrs. Bellush to be murdered, he points to Rocha's disbelief, after being told of Mrs. Bellush's murder, and to his own statement, after learning of the murder, that

"[y]ou guys messed up". These statements, however, in no way constitute evidence that Blackthorne did not intend her murder.

Rocha's initial reaction was skepticism that Gonzales and Del Toro had finally carried out what they had been hired to do, rather than "surprise" that Mrs. Bellush had been murdered. According to Rocha, he "was more interested in finding out if Joey [Del Toro] actually killed her or not because [he] still wasn't sure that it actually had happened". In other words, Rocha wanted to make sure Del Toro had done what he had been paid to do.

A rational juror could find that Blackthorne's assessment that the three had "messed up" was not in reaction to Mrs. Bellush's murder that, instead, Blackthorne was referring to Mrs. Bellush's being murdered in her home. Blackthorne had given Rocha "a couple of scenarios, and his scenarios included no one finding the body". Where Del Toro "messed up" was not in murdering Mrs. Bellush, but in not disposing of her body.

In July 1997, Blackthorne asked Rocha to find someone to murder Mrs. Bellush. That October, when Rocha observed that she could die from a beating, Blackthorne responded: "So be it". Blackthorne also directed that Gonzales and Del Toro "[u]se their imagination" and that they "dump her in the ocean or bury her in the woods".

Blackthorne next asserts that the $4,000 payment and the $10,000 incentive were not offered in consideration for murdering Mrs. Bellush. Instead, according to Blackthorne, the $4,000 was offered in exchange for Mrs. Bellush's beating, with the $10,000 being offered only as incentive for Blackthorne's gaining custody of his daughters.

As detailed above, Blackthorne's intent that Mrs. Bellush be murdered is clear. Although the $10,000 payment was predicated on Blackthorne's gaining custody, he stated that the best way for them to "get their $50,000.00 is if no one finds the body". Blackthorne's contention that he is absolved from the conspiracy by Del Toro's deciding to seek the $10,000 incentive is nonsensical. Assuming *arguendo* the $4,000 payment was solely to have Mrs. Bellush beaten, the fact that Del Toro chose to pursue the $10,000 incentive does not extinguish Blackthorne's culpability: Del Toro's choice to seek this higher remuneration does not change the fact that Blackthorne offered this incentive knowing the end result.

B.

Blackthorne maintains videotapes of a television interview with Rocha should have been admitted in evidence. "The admission or exclusion of evidence at trial is a matter committed to the discretion of the trial court"; we review for abuse of that discretion. ***United States v. George***, 201 F.3d 370, 373 (5th Cir.), *cert. denied*, 529 U.S. 1136 (2000); *see* FED. R. EVID. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected".)

The tapes at issue were out-takes (never aired segments) of an interview conducted in prison for a television documentary that aired in January 2000 about Mrs. Bellush's murder. In that interview, Rocha denied he or Blackthorne knew she was going to die; denied it was their intent for her to die; and stated he had falsely implicated

Blackthorne. On cross-examination at trial, Rocha admitted to these prior statements, which were inconsistent with his trial testimony.

Federal Rule of Evidence 613(b), which governs the admissibility of extrinsic evidence of prior inconsistent statements, provides, *inter alia*: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same". FED. R. EVID. 613(b). In construing this Rule, our court has held: "Proof of [a prior inconsistent] statement may be elicited by extrinsic evidence *only* if the witness on cross-examination *denies* having made the statement". ***United States v. Devine***, 934 F.2d 1325, 1344 (5th Cir. 1990) (emphasis added), *cert. denied*, 502 U.S. 1065 (1992).

Blackthorne claims he offered the tapes not to impeach Rocha's testimony concerning his and Blackthorne's involvement in the murder, but instead to impeach other testimony. Before addressing Blackthorne's contention, it is necessary to describe the evidentiary rulings concerning the tapes. During a break in Rocha's cross examination, the Government moved to exclude the tapes as hearsay. The district court reserved ruling, stating admissibility depended on whether the tapes would be used to show Rocha had earlier contradicted himself, in which case they would be admissible, or whether they would be used to show he had made an inconsistent statement, but had corrected himself, in which case they would not be admissible.

Blackthorne again moved to introduce the tapes during Rocha's cross examination after Rocha stated that both his and Blackthorne's intent was Mrs. Bellush's

murder and admitted he had made the prior inconsistent statements in the interview. After objection by the Government, and in a hearing outside the jury's presence, Blackthorne maintained the tapes were admissible "so you can see that earnestly the man [Rocha] looks at the camera and in a very sincere and believable voice, he gives different testimony than he gave here in Court". The objection was sustained.

During the continued questioning of Rocha, Blackthorne's counsel asked him about several of his statements made in the taped interview. On the basis that Rocha had no specific recall of the words he then used, Blackthorne moved to admit the tapes as a past recollection recorded under FED. R. EVID. 803(5). The Government objected, but the district court allowed Rocha during the next recess to review the tapes to refresh his memory.

After reviewing the tapes, Rocha again admitted to making the prior inconsistent statements. Blackthorne moved to admit the tapes for the purpose of impeaching Rocha's testimony that he was a bad liar, after the following testimony by Rocha:

> Q. Now, having reviewed those tapes, and seeing what your demeanor was on the tape, your inflection on the tape, how you answered the questions on the tape, would you agree that you came across on that tape as a very truthful, honest individual?
>
> A. No, I do not agree.

Blackthorne contends the tapes were admissible not only to impeach Rocha's testimony that he was a bad liar, but also "to allow the jury to determine how persuasive a liar he was so that the jury could intelligently assess his

credibility". Blackthorne contends the tapes were relevant for these other purposes under Rule 401. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". FED. R. EVID. 401.

Assuming *arguendo* that the tapes do not constitute extrinsic evidence of prior inconsistent statements, and that Rocha's opinion concerning whether he was credible in the taped interview is relevant, the tapes are still subject to Rule 403's balancing test: their probative value must *substantially* outweigh the "danger of unfair prejudice, confusion of the issues, or delay, waste of time, or needless presentation of cumulative evidence". FED. R. EVID. 403.

Rocha's opinion on this point has little probative value on whether he was credible – a matter for the jury to decide. Conversely, the danger of unfair prejudice and confusion of the issues is great. Accordingly, there was no abuse of discretion.

C.

Blackthorne claims it was error to admit his prior threats against Mrs. Bellush, as well as Mrs. Bellush's allegations he had abused one of their daughters. He maintains: the district court should not have ruled pretrial on admissibility; he was never given a chance to rebut the evidence of abuse; the Government repeatedly delved into the issue of abuse; and a mistrial should have been declared when a witness stated Blackthorne had been investigated on the basis of the abuse allegations.

Regarding this evidence, Blackthorne moved *in limine* a week before trial, asserting the evidence should not be admitted pursuant to Rules 402, 403, and 404(b). On 12 June, the day trial began, the district court denied the portion of the motion concerning the threats and abuse allegations. (Blackthorne's motion was granted, however, concerning alleged assaults by Blackthrone against Mrs. Bellush pending a hearing on their relevance).

Pursuant to the rule extant at the time of Blackthorne's trial, if a motion *in limine* is overruled, the movant must "renew his objection when the evidence is about to be introduced at trial". ***United States v. Graves***, 5 F.3d 1546, 1551 (5th Cir. 1993) (internal quotation marks omitted), *cert. denied,* 511 U.S. 1081 (1994). The purpose of that rule was "to allow the trial judge to reconsider his in limine ruling with the benefit of having been witness to the unfolding events at trial". *Id.* at 1552. (Such motion-renewal is no longer necessary under certain circumstances. Pursuant to an amendment to Rule 103(a), effective 1 December 2000, where the district court "makes a *definitive* ruling on the record admitting or excluding evidence, either at or *before trial*, a party need not renew an objection . . . to preserve a claim of error for appeal". FED. R. EVID. 103(a) (emphasis added). This amendment does not apply to Blackthorne because his conviction occurred prior to the amendment.)

Blackthorne objected under Rules 403 and 404 when evidence of the threats and abuse allegations were introduced at trial. Accordingly, we review the evidentiary rulings for abuse of discretion. *See* ***George***, 201 F.3d at 373.

a.

The Government introduced the following evidence of Blackthorne's threats: between 1985 and 1987, he threatened to kill Mrs. Bellush if she ever left him or hurt his business, including that he would have her "taken care of" and would have someone else do it; between 1988 and 1992, he told his daughter he hated Mrs. Bellush, wanted her dead, and "wouldn't care if she was killed", because she caused others to lie about him; in 1990 he threatened to kill her if she ever angered him; and in 1992, he stated he had the contacts to have her taken to Mexico and "she wouldn't return".

Under Federal Rule of Evidence 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

FED. R. EVID. 404(b). Whether evidence of prior bad acts, such as these threats, is admissible involves a two step test. "First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403." ***United States v. Beechum***, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

Blackthorne challenges the threats' admissibility on the basis they are too remote to the 1997 murder. "Although the remoteness of extrinsic acts evidence may

weaken its probative value, the age of the prior [act] does not bar its use under Rule 404." ***United States v. Broussard***, 80 F.3d 1025, 1040 (5th Cir.), *cert. denied sub nom.* 519 U.S. 906 (1996).

The threats occurred between approximately five and 12 years before the murder. In ***United States v. Richards***, 204 F.3d 177, 200 (5th Cir.), *cert. denied sub nom.* 531 U.S. 826 (2000), we upheld the admission of acts occurring three to five years before the charged offense; in ***United States v. Hernandez-Guevara***, 162 F.3d 863, 872-73 (5th Cir. 1998), *cert. denied*, 526 U.S. 1059 (1999), admission of an 18-year-old conviction; and in ***United States v. Chavez***, 119 F.3d 342, 346-47 (5th Cir.), *cert. denied sub nom.* 522 U.S. 1021 (1997), admission of a 15-year-old conviction.

Obviously, in the light of Blackthorne's defense that he did not intend that Mrs. Bellush be murdered, his intent was a fundamental facet of the Government's case and these threats were relevant to that intent. They are also highly probative, substantially outweighing any prejudicial effect their remoteness may have had: they demonstrate a pattern of Blackthorne's desire to harm, or more specifically, to have someone else harm, Mrs. Bellush. *See, e.g.*, ***United States v. Hadley***, 918 F.2d 848 (9th Cir. 1990) (upholding admission of a "regular pattern" of similar conduct over a ten-year period, despite a ten-year hiatus between the most recent prior conduct and the charged conduct), *cert. dismissed*, 506 U.S. 19 (1992).

Such a pattern is especially probative in this case. The threats occurred during the ten-year custody battle following Blackthorne and Mrs. Bellush's divorce.

b.

Regarding the admission of Mrs. Bellush's abuse allegations, Blackthorne contends they are not relevant; more prejudicial than probative; unproven; and remote.

As for relevancy, the Government offered the abuse allegations to demonstrate Blackthorne's motive. In the post-divorce, protracted custody battle, Blackthorne and Mrs. Bellush traded such allegations. These allegations angered him and, therefore, are highly relevant as to why he would want Mrs. Bellush dead.

Their probative value also substantially outweighs any prejudicial effect. Obviously, child abuse allegations can be prejudicial; but the limiting instructions, discussed *infra*, cured any excessive prejudice. Furthermore, brought to the jury's attention was the fact that the allegations were only made, not that they were true. Accordingly, Blackthorne has not demonstrated their inadmissibility under Rule 403.

Blackthorne also contends the Government was required under Rule 404(b), to prove the truth of the abuse allegations. *See* ***Huddleston v. United States***, 485 U.S. 681, 689 (1988) ("In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude the act occurred and that the defendant was the actor."). The Government responds: the allegations do not fall under Rule 404(b) as extrinsic evidence of other crimes, wrongs, etc.; instead, their relevance was Mrs. Bellush's making the allegations, not that Blackthorne had committed the claimed abuse.

The district court held: "the evidence of *allegations* is probative both on the question of motive and for the

purpose of establishing the relationship between [Blackthorne] and Bellush. Rule 404(b) is inapplicable here, where the evidence is not offered to show that [Blackthorne] did engage in the alleged conduct". (Emphasis in original.)

We agree. The Government did not seek to introduce evidence of prior bad acts. Instead, it introduced evidence that Mrs. Bellush made the allegations against Blackthorne; the veracity of those allegations was irrelevant to the question of Blackthorne's motive. Accordingly, the Government was not required to prove their truth.

Similar to his challenge to the prior threats, Blackthorne contends the abuse allegations are too remote. According to him, the allegations occurred in May 1991, January 1992, June 1993, and June/July 1997 child custody modification/enforcement actions.

Our prior remoteness analysis regarding the threats concerned Rule 404(b). Although we have held the abuse allegations are not Rule 404(b) evidence, our court has recognized that remoteness is a question of relevance. *See* ***United States v. Grimes***, 244 F.3d 375, 384-85 (5th Cir. 2001) (holding evidence of prior acts relevant despite a gap in time).

The abuse allegations are not too remote. This was an ongoing pattern and practice, with the most recent allegations having been made approximately only four months before the murder. Our having held, in some instances, that 15 and 18 years is not too remote, these allegations, made from several months to approximately six years before the murder, are likewise not too remote.

2.

As the basis for his claim that the district court should not have ruled pre-trial on the admissibility of the threats and abuse allegations, Blackthorne maintains the Rule 403 balancing test could not be performed until the evidence was offered at trial "because the incremental probity of the evidence must be balanced against the prejudice".

In the pre-trial motion in *limini*, discussed *supra*, in addition to moving to exclude, *inter alia*, evidence of the threats and abuse allegations, Blackthorne stated that it would be impossible for the district court to then rule on those issues. It does not appear that Blackthorne renewed this objection when this evidence was admitted at trial.

The failure to renew, however, does not prevent preservation of this claimed error. As discussed *supra*, we explained in ***Graves*** that the purpose of a renewed objection at trial, following an adverse in *limini* ruling, "is to allow the trial judge to reconsider his [earlier] ruling with the benefit of having been witness to the unfolding events at trial". 5 F.3d at 1552. This purpose is inapplicable here; this issue solely concerns the propriety of ruling pre-trial, not the propriety of the evidentiary ruling. Accordingly, we review the ruling for abuse of discretion. *See* ***George***, 201 F.3d at 373.

The district court's pre-trial, written ruling is detailed and comprehensive. Other than the above-quoted general contention, Blackthorne offers no specific explanation as to why these issues were not appropriate for a pre-trial ruling. Even assuming *arguendo* the district court erred in ruling then, Blackthorne had, and took advantage of, the opportunity when the evidence was presented to renew his objections. When he did so, the district court ruled on such

renewed Rules 403 and 404 objections. This opportunity cured any claimed error in the timing of the district court's ruling pre-trial.

3.

Claiming the district court erred in "allowing the government to repeatedly delve" into the abuse allegations, Blackthorne cites the testimony of nine witnesses who mentioned the allegations. However, he does not complain of the manner, or of the extent, that these witnesses testified.

Again, the allegations were essential to prove motive. Blackthorne has not shown the district court abused its discretion in allowing the Government to use this number of witnesses to corroborate Mrs. Bellush's making the allegations.

4.

Blackthorne also asserts the district court erred in not allowing him to disprove the abuse allegations, claiming he demonstrated to the district court that the allegations were false. Again, the truth of those allegations was not relevant; of relevance was whether they were only made. As the district court correctly ruled, "where the evidence is not offered to show that [Blackthorne] did engage in the alleged conduct [,] the Court [should] not permit the question of the truth of the allegations to be litigated".

Blackthorne next challenges the denial of the mistrial he sought when a witness testified that law enforcement had investigated the abuse allegations. The denial is reviewed for abuse of discretion. ***E.g.***, ***United States v.***

Honer, 225 F.3d 549, 555 (5th Cir. 2000); ***United States v. Paul***, 142 F.3d 836, 844 (5th Cir.) ("refusal to grant a mistrial based on the admission of prejudicial evidence is reviewed for an abuse of discretion"), *cert. denied*, 525 U.S. 919 (1998).

On direct examination by the Government, Shannon Garcia, an investigator with the Child Protective Services Division of the Texas Department of Protective and Regulatory Services, testified that a sheriff's department detective attempted to obtain from her a "videotape of the sexual abuse" allegations by Blackthorne's daughter. Blackthorne maintains this put the truth of the allegations at issue and prejudiced him.

"If the motion for mistrial involves the presentation of prejudicial testimony before a jury, a new trial is required only if there is a significant possibility that the prejudicial evidence had a substantial impact upon the jury verdict, viewed in [the] light of the entire record." ***Paul***, 142 F.3d at 844. In addition, a cautionary instruction can obviate the need for a mistrial. *See, e.g.*, ***United States v. Barfield***, 527 F.2d 858, 862 (5th cir. 1976) (because the "instruction was adequate to assuage the prejudice injected by the remark . . . the district court did not err in overruling defendant's motion for mistrial").

The Government contends the testimony was not prejudicial because it did not imply the allegations were true, only that they were investigated. Also, the Government points to the limiting instruction given the jury on the next morning of testimony:

> As you have heard me say from time to time, throughout this trial, the allegations between Allen Blackthorne and Sheila Bellush reflected in

> the pleadings and testimony were only allegations. . . . In addition, I had previously instructed you that Sheila Bellush's allegations that Allen Blackthorne had sexually abused their daughter . . . must not be considered by you as true. I want to reemphasize that instruction. So I'll instruct you that Sheila Bellush's allegations that Allen Blackthorne had sexually abused their daughter . . . must not be considered by you as true. So you should not think or even suspect that Allen Blackthorne sexually abused [her]. *That's not part of this case, and it's being brought out merely to show some of the allegations that were made.*

(Emphasis added.)

In the light of the entire record (particularly the evidence against Blackthorne, discussed *supra*), the limiting instruction, and the nature of Garcia's statement, there is not a *significant* possibility that this evidence had a *substantial* impact on the jury verdict.

D.

Consistent with his objection at trial, Blackthorne next maintains that portions of Mrs. Bellush's 1987 divorce deposition should not have been admitted in evidence. Again, we review for abuse of discretion. *See* ***George***, 201 F.3d at 373.

In the portions of her deposition read to the jury, Mrs. Bellush stated that Blackthorne threatened: to kill her or have someone else do so; to make sure she would never walk again; and to maim her face. This evidence was admitted pursuant to Rule 804(b)(1).

Under that Rule, excepted from the prohibition on hearsay is:

> Testimony given as a witness at another hearing of the same or a different proceeding, *or in a deposition* taken in compliance with law in the course of the same *or another* proceeding, if the party against whom the testimony is now offered . . . had an opportunity and *similar* motive to *develop* the testimony by direct, cross, or redirect examination.

FED. R. EVID. 804(b)(1) (emphasis added).

1.

Blackthorne contends he did not have a similar motive to develop this testimony during the divorce deposition. It did not exist, according to him, because "where a party is trying to ascertain what the other side has in the way of dirt in a divorce case[,] . . . [Blackthorne's] counsel would [not have] want[ed] to cross examine [Mrs. Bellush] on everything possible: that would be done at the time of the divorce trial (for strategic reasons)". (Parenthetical in original.) The Government responds: Blackthorne had a similar motive to discredit the testimony during the divorce deposition because it was critical to child custody, property division, and tort liability issues.

In ***United States v. McDonald***, 837 F.2d 1287 (5th Cir. 1988), McDonald and Minteer engaged in a scheme to defraud ANICO, an insurance company. Once aware of the fraud, ANICO sued McDonald and Minteer. While the civil action was pending, McDonald and Minteer were indicted.

Prior to their indictment, however, ANICO took Minteer's civil discovery deposition; it was exculpatory of

McDonald. During the criminal proceedings, when Minteer exercised his Fifth Amendment right not to testify, McDonald moved unsuccessfully, under Rule 804(b)(1), to admit Minteer's helpful deposition.

Our court upheld that ruling on the basis ANICO and the Government would not have had similar motives:

> [A]lthough ANICO and the government had similar status in their respective claims, . . . the trial strategies were not sufficiently similar to admit the Minteer deposition. Minteer's deposition was taken before either McDonald or Minteer had been indicted, thus ANICO, knowing that it would have the opportunity to cross-examine Minteer at trial did not have the same incentives to then develop inaccuracies in the deposition testimony. The government had no opportunity to examine Minteer at [the criminal] trial, because he exercised his right not to testify. Aware of that risk, the government would, as in most cases, have had a strong incentive to develop fully the testimony at the time of the [earlier civil] deposition.

McDonald, 837 F.2d at 1293.

McDonald essentially placed the Government, with the circumstances that it faced in the criminal trial, in ANICO's shoes at the time of the deposition and determined that the motives were not similar. The same is true here. Had Blackthorne been faced at the time of the deposition with the circumstances he faced in this criminal matter, he obviously would not have waited to develop any flaws or inconsistencies in Mrs. Bellush's deposition testimony, especially knowing she would not be subject to cross-examination in her own murder trial.

Rule 804(b)(1) "does not require that the party against whom the prior testimony is offered had a compelling tactical or strategic incentive to subject the testimony to cross-examination, only that an opportunity and similar motive to develop the testimony existed." ***United States v. Mann***, 161 F.3d 840, 861 (5th Cir. 1998), *cert. denied*, 526 U.S. 1117 (1999). On the other hand, pursuant to ***McDonald***, where the party in the subsequent action has a compelling incentive to subject the testimony to cross-examination, but did not have the incentive at the time of the deposition, there is no similar motive. Accordingly, the district court erred in admitting the deposition testimony.

2.

Our analysis, of course, does not end here. "If we find an abuse of discretion, then we decide whether . . . it constitutes harmless error." ***United States v. Munoz***, 150 F.3d 401, 412 (5th Cir. 1998), *cert. denied*, 525 U.S. 1112 (1999). "Harmless error is [a]ny error, defect, irregularity or variance which does not affect substantial rights. It arises when the mistake fails to prejudice the defendant. Prejudice occurs when the error ha[s] affected the outcome of the district court proceedings." ***Id.*** at 412-413 (internal quotation marks, citations, and footnote omitted.)

The deposition testimony did *not* affect the outcome of the proceedings. As discussed *supra*, the evidence against Blackthorne, particularly through Rocha's and Gonzales' testimony, was exceptionally strong.

Furthermore, the portions of the deposition read to the jury pertained only to threats Blackthorne allegedly made against Mrs. Bellush. Other evidence firmly substantiated Blackthorne's making them. Mrs. Bellush's

sister testified that she witnessed Blackthorne threaten to kill Mrs. Bellush; Blackthorne's business associate, that Blackthorne told him "he had the contacts to have [Mrs. Bellush] taken to Mexico and she wouldn't return"; and Mrs. Bellush's daughter, that Blackthorne told her he "wouldn't care if [Mrs. Bellush] was killed. He wanted her dead".

Mrs. Bellush's deposition was cumulative of this testimony. Arguably, it had less credibility because it was given during contentious divorce proceedings. Mrs. Bellush and Blackthorne were engaged in a bitter custody dispute; her motive for veracity was arguably less than the above-described witnesses. The error was harmless.

E.

Blackthorne maintains the Government elicited false testimony from Gonzales in violation of ***Napue v. Illinois***, 360 U.S. 264 (1959) (due process denied where Government elicits false testimony it knows to be false, or, while not eliciting the testimony, knows of its falsity and allows it to go uncorrected). A new trial based on a ***Napue*** violation is proper only where: "(1) the statements in question are shown to be actually false; (2) the prosecution knew that they were false; and (3) the statements were material". ***United States v. O'Keefe***, 128 F.3d 885, 893 (5th Cir. 1997), *cert. denied*, 523 U.S. 1078 (1998). A statement is "material" if there is a "unreasonable probability of a different outcome". ***Id.*** at 894 (internal quotation marks omitted).

The Government contends that, because Blackthorne did not make a ***Napue*** objection, we should review only for plain error. Blackthorne responds that a ***Napue*** violation

is structural error, and no objection is necessary to preserve it. We need not resolve this issue; Blackthorne's claim fails under even the traditional, more lenient, standard of review.

On direct examination by the Government, Gonzales testified: on 13 September 1997, he and Del Toro were in Boerne, Texas, attempting to locate Mrs. Bellush; and he "saw her in the backyard". Blackthorne contends this testimony is false, and the Government knew it to be so, because Mrs. Bellush's airline flight schedule, produced by the Government to the defense, reflects that she did not travel from her new home in Florida to Texas until 14 September, a day after *Gonzales* testified he saw her in Texas.

The Government maintains the testimony was not false because, on cross-examination, Gonzales clarified that he *thought* the woman he saw was Mrs. Bellush, based on pictures Blackthorne had provided Rocha. Alternatively, the Government contends the claimed false testimony was not material, because any falsity was fully explored and corrected on cross-examination.

Where falsehoods are "sufficiently exposed before the jury to enable the jury to weight those falsehoods in its deliberations", such falsehoods are not material, because "enough information was provided to the jury to enable [it] to adequately perform [its] fact-finding function and to maintain the level playing field between the prosecution and the defense". ***O'Keefe***, 128 F.3d at 896-97.

Any false information Gonzales may have conveyed to the jury was corrected. The testimony was not material.

F.

Blackthorne next contends, with respect both to Count Two of the indictment (causing another to cross state lines with the intent to commit domestic violence), and to the evidence of the abuse allegations, that the district court erred both in its jury charge and by refusing to give his requested instructions.

"We review jury instructions to determine whether the court's charge as a whole[ ] is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." ***United States v. Stouffer***, 986 F.2d 916, 925 (5th Cir.) (internal quotation marks omitted), *cert. denied*, 510 U.S. 837 (1993). Concerning requested instructions being refused, we review for abuse of discretion, determining: "whether the requested instruction (1) is a correct statement of the law; (2) was substantially given in the charge as a whole; and (3) concerns important aspects of the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense". ***Id.*** at 925-26 (internal quotation marks omitted).

1.

For Count Two, Blackthorne contends the district court erred by instructing the jury could find Blackthorne *directly or indirectly* caused Del Toro to cross state lines. Blackthorne objected to the inclusion of "directly or indirectly". According to him, the instruction was erroneous because this language does not appear in 18 U.S.C. § 2(b), and its use results in a constructive amendment of the indictment, which charged that he caused Del Toro to cross state lines.

a.

Section 2(b) does not include the language "directly or indirectly". But, as discussed *supra*, it covers one who knowingly and willfully "puts in motion" or "assists in" an illegal enterprise. ***United States v. Smith***, 584 F.2d 731, 734 (5th Cir. 1978). Furthermore, as also discussed *supra*, § 2(b) does not require that Blackthorne be the sole cause of the performance of the act. ***See United States v. Levy***, 969 F.2d 136, 141 (5th Cir. 1992).

b.

Blackthorne's contention that the instruction constructively amended the indictment is equally without merit. "A constructive amendment of the indictment occurs when the jury is permitted to convict the defendant on a factual basis that effectively modifies an essential element of the offense charged in the indictment." ***United States v. Millet***, 123 F.3d 268, 272 (5th Cir. 1997), *cert. denied*, 523 U.S. 1023 (1998).

Millet, a Hobbs Act prosecution, held: "[W]hen the indictment is drawn generally, the government may offer proof that the act either *directly or indirectly affected interstate commerce*". **Id.** at 274 (emphasis added). Likewise, the use of "directly or indirectly" in the case at hand did not modify the generally charged essential element of the offense: that Blackthorne caused Del Toro to cross state lines.

Also for Count Two, Blackthorne contends the district court erred in not giving his requested instruction on causation. It states, in part: the jury should determine whether Del Toro traveled to Florida *solely* because of Blackthorne's promise of money, or whether he so traveled because of Rocha's promise of future employment; and

unless the jury found Del Toro traveled to Florida *solely* because of Blackthorne's promise of money, it must acquit on Count Two.

The instruction would have required Blackthorne to be the sole cause of Del Toro's crossing state lines. As discussed *supra*, it was not a correct statement of the law.

3.

Again for Count Two, Blackthorne bases error on the refusal to give part of his proposed instruction relating to his theory of the case. The requested instruction stated it was Blackthorne's position that he did not cause Del Toro to travel to Florida; that it was Rocha who did so with his future employment promise.

This was another attempt to have the jury instructed that, if Rocha's claimed incentive of future employment in any way caused Del Toro to cross state lines, then Blackthorne was absolved of guilt. As discussed *supra*, even if Rocha's future employment offer was a cause of Del Toro's traveling to Florida, Blackthorne is still culpable under 18 U.S.C. § 2(b). *See* ***Levy***, 969 F.2d at 141. The rejected portion, therefore, is not a correct statement of the law and would have been potentially confusing to the jury.

4.

Blackthorne challenges the limiting instructions concerning the abuse allegations. The district court gave them four times. The first stated, in part: "[N]obody says that it happened or didn't happen". The error, according to Blackthorne, is that "no one would stand silently by when

accused of sexual abuse and not deny the allegation, unless he was guilty".

For the second instruction, Blackthorne contends the court's statement that the truth of the allegations was not an issue in the trial implied the allegations were true. For the third, he complains it "merely informed the jury that all of the allegations contained in the divorce related proceedings were not being offered for the truth of the matters asserted". Finally, concerning the fourth, Blackthorne reaches the heart of his complaint: the court did not instruct the jury the allegations were false.

Blackthorne does not demonstrate that the limiting instructions as a whole were not a correct statement of the law. He relies on ***Bruton v. United States***, 391 U.S. 123, 135 (1968), which observed that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored". According to Blackthorne, child abuse is such a context.

The limiting instructions were more than adequate. The jury was repeatedly admonished that the truth of the allegations was not at issue, and that it was only to consider, for limited purposes, the fact that the allegations were made.

5.

Concerning the evidence of Blackthorne's prior threats to harm Mrs. Bellush, the court instructed the jury, in part, that if it found from the evidence, other than the threats, that Blackthorne committed the acts charged in

the indictment, only then could it consider the threats for the limited purposes of determining Blackthorne's intent, motive, and state of mind, as well as in determining the relationship between Blackthorne and Mrs. Bellush. Blackthorne contends the limiting instruction concerning the abuse allegations should also have contained this language, and moved the district court to include it. That instruction essentially stated: the jury must not consider the abuse allegations as true; it could not consider the prior acts in determining Blackthorne's innocence or guilt; and it could consider the allegations only for very limited purposes.

The language Blackthorne contends should have been included in the limiting instruction is found in Fifth Circuit Pattern Jury Instruction 1.30. *See* 5TH CIR. PATTERN JURY INSTRUCTIONS § 1.30 (West 1990). That instruction is entitled "SIMILAR ACTS", with the first sentence stating: "During this trial, you have heard evidence of *acts* of the defendant which may be *similar to those charged* in the indictment, but which were committed on other occasions". ***Id.*** (emphasis added.)

Obviously, the pattern instruction is intended to be used where evidence of similar acts is introduced. The abuse allegations are not evidence of any act *by Blackthorne*; instead, they are evidence of allegations made *by Mrs. Bellush*. Furthermore, the conduct alleged in those allegations is in no way similar to the charged conduct.

G.

The district court is claimed to have erred in answering the following question from the jury: "Can [we] have [an] instruction on 'state of mind'?". "The trial judge

retains his discretion to tailor his jury instructions when he must supplement them during the jury's deliberations." ***United States v. Duvall***, 846 F.2d 966, 977 (5th Cir. 1988). "When evaluating the adequacy of supplemental jury instructions, we ask whether the court's answer was reasonably responsive to the jury's question and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it." ***United States v. Sylvester***, 143 F.3d 923, 926 (5th Cir. 1998) (internal quotation marks omitted).

Over Blackthorne's objection, the court answered: "State of mind means 'intent' or 'knowingly' as those terms have been used in these instructions". Blackthorne maintains the answer was incorrect because, under the dictionary definition, a person's state of mind encompasses more than intent and is subject to change.

The Government responds that the supplemental instruction was adequate because, when state of mind was used in the instructions, it was synonymous with intent. Concerning the abuse allegations, the court had instructed the jury could consider the allegations "to determine whether the Defendant had the state of mind or intent necessary to commit the crime". Concerning the threats, the jury was instructed it could consider them for, *inter alia*, "determining whether the Defendant had the state of mind or intent necessary to commit the crimes charged". Finally, in defining intent, the court had instructed: "You may consider any statement made by the defendant and all other facts and circumstances in evidence which indicate his *state of mind*". (Emphasis added.)

State of mind may encompass meanings other than knowingly or intent; but, as the term was used in the jury

instructions, it was synonymous with intent. Accordingly, the supplemental instruction was reasonably responsive to the jury's inquiry; and, along with the earlier instructions, it allowed the jury to understand the issues presented to them.

H.

The final claimed error is premised on the district court's not holding a hearing to consider Blackthorne's new trial motion premised, in part, on Rocha's recantation of his testimony. Restated, Blackthorne does not challenge the motion's denial, only the lack of an evidentiary hearing. We review for abuse of discretion. *E.g.*, ***United States v. Aguiar***, 610 F.2d 1296, 1305 (5th Cir.), *cert. denied sub nom.* 449 U.S. 827 (1980).

In an undated affidavit claimed to have been delivered to Blackthorne's attorney approximately two-and-a-half months after the verdict, Rocha stated: Blackthorne "had nothing to do with the murder"; Rocha's "motive to get involved" was Blackthorne's "status"; and Rocha thought that, if he murdered Mrs. Bellush, he "could go back to [Blackthorne] and benefit from this in some form of a business deal". Blackthorne states that, in addition to Rocha's affidavit, given to Blackthorne's civil attorney, that attorney recorded his conversations with Rocha, for use by the court.

"Generally, a motion for new trial may be decided upon affidavits without evidentiary hearings." ***United States v. Metz***, 652 F.2d 478, 481 (5th Cir. Unit A Aug. 1981). Blackthorne's contention is based on his not being able to develop Rocha's recantation through use of the taped conversation. He does not assert, however, that he

made the district court aware of the tapes. Furthermore, he never mentioned them in his new trial motion. Instead, he stated: "The Court may not be aware that on September 22, 2000, . . . Rocha recanted his trial testimony *by affidavit*". (Emphasis added.) Moreover, neither Rocha's affidavit, nor that of the attorney who purportedly recorded the recantation, mentions the tapes.

The district court did not abuse its discretion by not holding an evidentiary hearing to consider tapes of which it was unaware.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-51256

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ALLEN BLACKTHORNE

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Filed Jun. 10, 2002)

(Opinion 5/3/02, 5 Cir., ___, ___ F.3d ___)

Before DUHÉ, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa Hawkins Barksdale
United States Circuit Judge